Supreme Court, U.S.
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IN THE
SUPREME COURT of the UNITED STATES

Robert W. Grine II, Joanne D. Grine, Estate of Margaret M. Grine,
Petitioners

vs.

WILLIAM R. COOMBS; BILLIE M. YOST; JACK W. SHRUM, ET UX; ROTOCAST PLASTIC; ESSEX ENVIRONMENTAL INDUSTRIES, INC.; TIONESTA BOROUGH COUNCIL; RONALD HALL, President of Borough Council, in an individual and official capacity; SCOTT DAUM, Borough Manager of Tionesta, in an individual and official capacity; COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION ("DEP"); GARY WOZNIAK, in an individual and official capacity as an agent of the DEP; DANIEL HOLLER, Emergency Response Coordinator, Northwest Region, in an individual and official capacity, as an agent of the DEP; RONALD W. COOMBS, Executor of the Estate of WILLIAM R. COOMBS, DECEASED; UNITED STATES OF AMERICA ENVIRONMENTAL PROTECTION AGENCY (EPA);BRADLEY M. CAMPBELL, Regional Administrator, Region III, U.S. EPA;
Respondents

On Petition for a Writ of Certiorari
To the Third Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Third Circuit Court of Appeals erred and violated the Petitioners' rights to due process of law when it summarily affirmed the district court's orders on appeal after vacatur and remand, thus precluding all briefing and argument on the merits by Petitioners, when the standard for summary disposition was not met on a record exhibiting that the district court's original orders were vacated and annulled for error by the Court of Appeals?

II. Whether the Third Circuit Court of Appeals erred and violated the Petitioners' rights to due process of law when it summarily affirmed the district court's orders on appeal after vacatur and remand and precluded any opportunity for normal briefing and argument on the merits by Petitioners, when the standard for summary disposition was not met on a record exhibiting the district court's deliberate refusal to comply with remand orders?

III. Whether the Court of Appeals erred and infringed upon the Petitioners rights to due process of law when it granted a non-party's motion for summary affirmance of lower court orders on appeal after vacatur and remand, though it lacked jurisdiction to entertain such a motion from a non-party to the appeal?

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IN THE
SUPREME COURT of the UNTIED STATES

Robert W. Grine II, JoAnne D. Grine, and the
Estate of Margaret M. Grine,
Petitioners

vs.

The Estate of William R. Coombs, et al,
Respondents

Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Third Circuit

Petitioners, Robert W. Grine II, JoAnne D. Grine, and the Estate of Margaret M. Grine, respectfully pray that a writ of certiorari issue to review the order of the United States Court of Appeals for the Third Circuit entered in this proceeding on November 17, 2000.

OPINIONS BELOW

The United States Court of Appeals' opinion and order of July 15, 1999, which is unreported, appears at Appendix A (App. A.). The District Court orders of April 18, 2000, appear at Appendix B (App. B.). No opinion was written or reported. The decisions of the United States Court of Appeals of September 13, 2000, granting without opinion the Commonwealth of Pennsylvania Department of Environmental Protection and Daniel Holler and Gary Wozniak's (Commonwealth Appellees) Motion for Summary Affirmance of the district court orders of April 18, 2000 and Withdrawal of Appellees' Motion to Dismiss, and granting the United States' Motion for Summary Affirmance, appear at Appendix C, and they are unreported (App. C.). The summary decision of the U.S. Court of Appeals denying the timely filed Petition for Rehearing appears at Appendix D (App. D.) and it is unreported.

GROUNDS FOR JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The orders of the United States Court of Appeals summarily affirming the district court's orders of April 18, 2000, were issued on September 13, 2000. The Court of Appeals denied Petitioners' timely Petition for Rehearing on November 17, 2000. A certified copy of the judgement was issued in lieu of a formal mandate on December 20, 2000.

The question presented did not arise until Petitioners received the Third Circuit Court of Appeals' summary decisions affirming the District Court orders of April 18, 2000. Petitioners thereupon sought rehearing and argued that the Court of Appeals had erred for numerous reasons and that its decision resulted in fundamental unfairness and a violation of the due process clause of the federal constitution.

The jurisdiction of the United States District Court for the Western District of Pennsylvania was invoked pursuant to 28 U.S.C. §1331.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

This case concerns the Fifth Amendment to the United States Constitution which provides in pertinent part, that "No person shall ... be deprived of life, liberty, or property, without due process of law; ..."

STATEMENT OF THE CASE

Petitioners' initial complaint was filed on December 21, 1995; their Amended Complaint was filed on April 2, 1996. Petitioners are Robert W. Grine, II, Joanne D. Grine, and the Estate of Margaret M. Grine; Defendants are William R. Coombs; Billie M. Yost; Jack Shrum, et. ux.; Essex Environmental Industries, Inc.; Rotocast Plastic Products, Inc.; Tionesta Borough Council, Ronald hall, President of Borough Council, in an individual and official capacity; Scott Daum, Borough Manager of Tionesta, in an individual and official capacity; Commonwealth of Pennsylvania, Department of Environmental Protection; Daniel Holler, Emergency Response Coordinator, Northwest Region, in an individual and official capacity; Gary Wozniak, in an individual and official capacity; United States of America Environmental Protection and Michael McCabe, Regional Administrator, Region III, U.S. EPA.

Petitioners brought suit under the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. §6901 et. seq., the Federal Water Pollution Control Act ("Clean Water Act"), 33 U.S.C. §1251 et. seq., and the Comprehensive Environmental Response, Compensation, and Liabilities Act of 1980 ("CERCLA"), 42 U.S. C. §9601 et. seq., as amended

by the Superfund Amendments and Reauthorization Act of 1986. Petitioners also brought suit against the US EPA and its Region III Director under the Freedom of Information Act, 5 U.S.C. §552. The Amended Complaint also asserts causes of action under the state common-law theories of intentional infliction of emotional distress, trespass, nuisance and strict liability, as well as a claim pursuant to the Pennsylvania Hazardous Sites Cleanup Act ("PHSCA"), 35 Pa. Stat. Tit. 35, §6020.101 et seq.

Petitioners were the victims of rogue or midnight dumping of acutely hazardous toxic substances transported in federally-licensed overpack drums abandoned in close proximity to their home and private water supply. After they sued individual owners of the site, transporters, corporate entities who generated the waste, and government agencies which had failed to investigate the nature and extent of the contamination, Petitioners became the targets of a grand jury convened to investigate the commission of an environmental crime, and were surveilled by federal agents.

In September of 1998, Petitioners filed their Notice of Appeal at No. 98-3494 of two interlocutory orders issued by the District Court. Petitioners appealed from the Orders of December 31, 1996 as amended by the orders of August 17, 1998; the Petitioners also appealed from that portion of the August 17th order denying Plaintiffs' Motion for Reconsideration of the Order of February 9, 1998, and the order entered on August 25, 1998, limiting the evidentiary scope of a contempt hearing. The order of August 17th was entered as a final judgement in accordance with Rule 54(b) of the Federal Rules of Civil Procedure.

On July 15, 1999, at No. 98-3494, the Third Circuit Court of Appeals vacated and annulled for error the District Court's orders granting the Commonwealth's motion to dismiss for lack of subject-matter jurisdiction federal claims against all of the Commonwealth Defendants in an individual and official capacity, with prejudice, and dismissing state law

claims against the Commonwealth Defendants without prejudice, for lack of subject-matter jurisdiction.

The Court of Appeals affirmed the lower court's order of August 17, 1998, denying Plaintiffs' Motion for Reconsideration of the order of February 9, 1998. A timely Petition for Rehearing was filed on August 26, 1999, and denied by the Appellate Court, on October 1, 1999. Plaintiffs' Petition for Certiorari pertaining to this order was denied by the U.S. Supreme Court on February 22, 2000. The district court entered its new orders after vacatur and remand on April 18, 2000. Petitioners filed their Notice of Appeal on April 28, 2000. The appeal was docketed on May 11, 2000. The briefing and scheduling order was entered on August 23, 2000, setting the deadline for filing of an appeal brief by October 2, 2000. The appeal at 00-1460 had been assigned on June 15, 2000 by the Third Circuit to the appellate mediation program as per Local Appellate Rule 33.0. Petitioners, the PA DEP and the United States were ordered to attend the Mediation Session of August 10, 2000. No settlement was effected.

On March 21, 2000, Petitioners filed a motion to recall or vacate the mandate, on grounds that the opinion of July 15, 1999 at No. 98-3494 was in conflict with the subsequent decision of the United States Supreme Court regarding the requisite showing for standing and the forms of redress available to citizen-plaintiffs, in Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc., 120 S. Ct. (2000), as decided on January 12, 2000. The Court of Appeals denied the motion for recall on March 29, 2000. Timely petition for rehearing was filed on April 7, 2000 and denied on April 20, 2000.

On July 17, 2000, the PA DEP's Rule 27 Motion for Dismissal was submitted to the Court of Appeals. Petitioners filed an immediate response to this motion; on August 1, 2000, the Court of Appeals referred the PA DEP's Motion to the ultimate merits panel without prejudice to filing of a motion for summary affirmance.

The United States submitted its motion for summary affirmance on July 19, 2000. Petitioners in their response argued that a fraud had been worked on the Court of Appeals through government falsification of the record as to the harm being inflicted on the plaintiffs, and through the deliberate refusal of local, state and federal authorities and parties to this action to protect the Grines from criminal assaults in the form of poisoning and other physical attacks on their persons and property (i.e., drive-by shooting, stalking, and terroristic threats). Subsequent to the filing of this pleading, the physical attacks made on the Petitioners by persons in the employ of illegal transporters of hazardous waste on the Coombs site and by other as-yet-unknown assailants escalated in intensity to the point that counsel feared for her clients' lives. A narrative report of fifteen (15) of the worst of these criminal episodes from November of 1999 to the present was submitted on February 5, 2001, to the Special Agent in Charge of the Pittsburgh Office of the FBI, the U.S. Attorneys Office in Pittsburgh, and the Office of the Federal Ombudsman of the U.S. EPA, Robert Martin. Petitioners' response to this motion was filed on July 25, 2000, and it also emphasized the fact that the United States was a non-party to the orders on appeal after remand. The PA DEP again filed a motion for summary affirmance on August 21, 2000. Petitioners filed their response on August 30, 2000, emphasizing the irrelevance of law of the case doctrine to a vacated order.

On September 13, 2000, the court of Appeals without opinion granted the Commonwealth of Pennsylvania Department of Environmental Protection, Daniel Holler and Gary Wozniak's Motion for Summary Affirmance of the lower court orders of April 18, 2000 and granted the PA DEP's withdrawal of their motion to dismiss the appeal. On September 13, 2000, the Court of Appeals also granted the United States' Motion for Summary Affirmance of the Orders of April 18, 2000. These motions were affirmed over five months after Petitioners had filed their notice of appeal, and barely two weeks before the deadline came due for filing their appellate brief as per the court's scheduling orders.

On October 26, 2000, Petitioners filed their timely Petition for Rehearing which was summarily denied by the Court of Appeals on November 17, 2000.

On November 28, 2000, Petitioners filed in the appellate court a motion to stay the mandate. This motion was denied without prejudice to their right to file a timely petition for certiorari. Petitioners then filed a motion for stay of the mandate with the U.S. Supreme Court on January 5, 2001; this motion was denied on January 10, 2001, by Justice Souter.

REASONS FOR GRANTING THE WRIT

I. **The decision of the Third Circuit Court of Appeals conflicts with this Court's precedents and with settled law in the Third Circuit and other appellate jurisdictions.**

A. The Circuit Court of Appeals has operated in defiance of its own in-house rules of procedure and in so doing has infringed upon the Petitioners' fundamental right to obtain meaningful appellate review.

The Court of Appeals on July 15, 1999, vacated for error the district court orders of December 31, 1996, as amended by the order of August 17, 1998. On December 31, 1996, the district court dismissed with prejudice all federal and state claims against the Commonwealth Department of Environmental Protection and its agents Gary Wozniak and Daniel Holler, in an individual and official capacity, for lack of subject-matter jurisdiction. On August 17, 1998, the order of December 31, 1996, was amended to reflect that the Plaintiffs' state law claims against all of the Commonwealth Defendants were dismissed without prejudice, for lack of subject-matter jurisdiction.

The Court of Appeals on July 15, 1999, vacated and annulled for error the order of December 31, 1996, as amended and remanded for disposition in accordance with its opinion.

The district court apparently thought it could dismiss all state and federal claims against the Commonwealth defendants in an individual and official capacity for lack of subject-matter jurisdiction.

The Court of Appeals knew this approach to be flawed and suggested instead that the lower court on remand dismiss the federal claims against the individual Commonwealth defendants on the merits in reliance on Fed. R. Civ. Proc.

12(b)(6); (this approach was also deeply flawed, because the Commonwealth never raised such a challenge to the Amended Complaint).

Because the PA DEP's motion for dismissal had never identified a 12(b)(6) challenge to the face of the Amended Complaint pursuant to the Federal Rules of Procedure, the district court logically never made reference to a 12(b)(6) challenge to the Amended Complaint in dismissing for lack of subject-matter jurisdiction in its order of December 31, 1996, as amended. It was an impossibility for the district court to make any such disposition on the merits when the court held on so many words that it lacked subject-matter jurisdiction of every federal claim made against the Commonwealth defendants.

The order of April 18, 2000, written as per instruction for the Court of Appeals, went in a brand-new direction and announced that the district court definitely entertained subject-matter jurisdiction of the federal claims against the Commonwealth Defendants in their individual capacities because in its new order the district court dismissed federal claims on their merits in purported reliance on Fed. R. Civ. Proc. 12(b)(6).

The district court in its prior opinion of August 17th had stated that plaintiffs had no standing to bring suit because they allegedly failed to demonstrate the invasion of a legally protected interest; standing implicates subject-matter jurisdiction, and theories regarding standing or its lack have nothing to do with dismissal on the merits. The Court stated specifically that it dismissed the action for lack of subject-matter jurisdiction based on a facial challenge to the complaint.

The order of August 17, 1998 only revised the order of December 31, 1996 to the following extent: Plaintiffs' state law claims against the Commonwealth Defendants were

dismissed without prejudice. In all other aspects, Plaintiffs' Motion for Reconsideration was denied.

Thus the order of December 31, 1996, was never altered to reflect that the district court entertained subject-matter jurisdiction of the federal claims against the Commonwealth Defendants in their individual capacities until the order of April 18, 2000, was entered on remand.

The Court of Appeals instructed the district court to vacate its standing order and to reflect in the next set of orders on remand that the district court most definitely entertained subject-matter jurisdiction of the federal claims against the Commonwealth Defendants in their individual capacities, because it must in fact dismiss these claims on the merits pursuant to Fed. R. Civ. Proc. 12(b)(6), on grounds that the federal statutes did not provide citizen-plaintiffs with a private right of action against individual polluters.

Petitioners believe this disposition of the case to be deeply wrong in view of the position adopted by the U.S. Supreme Court in Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc., 120 S. Ct. 693 (2000), regarding available forms of redress for citizen-plaintiffs. It also remained the Plaintiffs' position that the record clearly indicated that a 12(b)(6) challenge was never raised by the Commonwealth in its pleadings in compliance with the Federal Rules of Procedure and could not be raised sua sponte by the district court or by the Court of Appeals.

The Commonwealth Appellees in their Rule 27 Motion for Summary Affirmance of August 21, 2000, erroneously stated that their original Motion to Dismiss filed pursuant to Fed. R. Civ. Proc. 8(e), was a motion for summary judgement. No such motion was ever filed by the PA DEP. The PA DEP asserted that the doctrine of law of the case dictated summary affirmance of the orders of April 18, 2000 on appeal after vacatur and remand.

Actual findings which are in error and which have been vacated do not constitute the law of the case. When a judgement is vacated, it is effectually extinguished and is without any validity, force or effect. The Court of Appeals overthrew, vacated, aborted, made void, repealed, revoked and revised the district court judgement erroneously concluding that the district court lacked subject-matter jurisdiction of all federal claims made against the individual Commonwealth Defendants. The Court of Appeals could not escape its obligation to correct this legal error. The judgement was annulled for error in this aspect, and in others: i.e., the district court erred in attempting to dismiss the Amended Complaint for lack of subject-matter jurisdiction with prejudice. The Court of Appeals in its opinion discussed at length the nature of this mistake. (Op. of the Ct.; App. A at pp. 5, 6.) Because the appellate court acted to vacate the decision below, that decision of the Court of Appeals does not operate as law of the case to constrain the Court of Appeals in further proceedings. Johnson v. Bd. of Education, 107 S. Ct. 2223, 72L.Ed.2d 668 (1982).

An erroneous decision is not the law of the case on subsequent appellate review. Chemical Leaman Tank Lines, Inc. v. Aetna Cas. and Surety Co., 177 F.3d 210 (3rd Cir. NJ 1999).

Other circuit courts of appeal have held that when the instruction of the Court of Appeals in remanding the case is to make such disposition of the case as might be appropriate, such decision does not preclude the Court of Appeals from entertaining an appeal on the merits from orders entered by the lower court on remand. Barber v. Yanish, 196 F.2d 53 (9th Cir. 1952).

Summary disposition is appropriate only when the position of one party is so clearly correct as a matter of law that no substantial question exists regarding the outcome of an appeal. Joshua v. U.S., 17 F.3d 378 (C.A. Fed. 1994).

The lower court has made a decree after vacatur and remand which prejudices the substantial right of plaintiffs, in respect of matter never concluded by the original decree, and its actions are subject to review upon a second appeal. Mackall v. Richards, 5 S. Ct. 170 (1884).

Local rules and Internal Operating Procedures of the United States Court of Appeals for the Third Circuit state unambiguously that the court may take summary action only if it clearly appears that no substantial question is presented or that subsequent precedent or a change in circumstances warrants such action. L.A.R. 27.4; IOP 10.6.

Other circuit courts of appeal, such as the United States Court of Appeals for the Fourth Circuit, have noted in their commentary on motions practice that motions for summary affirmance are reserved for extraordinary cases only and should not be filed routinely, but only on a record indicating that the issues raised on appeal are manifestly unsubstantial. Furthermore, in the majority view, motions for summary disposition should be made only after briefs are filed. If motions are submitted before the completion of the briefing schedule, the appellate court in fairness to the appellant should defer all action on the motion until the case is ripe for full disposition. The appellate court's failure to abide by its own rules has thus deprived the Petitioners of their right of meaningful access to the courts. It is of some importance to the public that full and fair review of legal questions be afforded to them, and not permanently removed through self interested manipulation by an appellate court of in-house rules. For this reason, Petitioners have sought review, and believe that in so doing they serve the public interest in fundamental fairness.

B. The Court of Appeals' summary affirmance of an order in which a lower court declined to exercise its supplemental jurisdiction over pendent claims without explanation should be reviewed because both the Court of Appeals and the lower court have ignored U.S. Supreme Court precedent and statutory authority to the effect that the district court must properly invoke statutory categories for declining to assert supplemental jurisdiction or else must assert its jurisdiction over pendent claims.

The Court of Appeals had no right to summarily affirm the district court's orders in this circumstance in view of the district court's deliberate refusal to clarify the record through explanation of its intentions to decline supplemental jurisdiction. The district court had written in its order of December 31, 1996, as amended by the order of August 17, 1998, that Plaintiffs' state law claims against the Commonwealth Defendants were dismissed without prejudice.

The Court of Appeals, in so many words, in its opinion of July 15, 1999, ordered the lower court to clarify the record through preparation of an appropriate order explaining the rationale for its apparent refusal to adjudicate common law and state claims under its pendent jurisdiction – if that in fact was the lower court's intention, as expressed in the first order to dismiss.

The Court of Appeals was apparently completely in the dark as to the meaning of the lower court's first order dismissing the state and common-law claims against the Commonwealth Defendants, without prejudice.

The district court in the order written on remand did nothing more than state that it declined to exercise supplemental jurisdiction over Plaintiffs' common-law and state claims against Defendants Wozniak and Holler in their

individual capacities, and dismissed those claims without prejudice, pursuant to Fed. R. Civ. P. 12(b)(1).

The Third Circuit Court of Appeals held in Sparks v. Hershey, 661 F2d 30 (3rd Cir. 1981), that where the district court does not set forth a persuasive, reasoned elaboration for dismissing state claims, the dictates of federal economy, fairness to parties and comity are better served by recognizing pendent jurisdiction. The district court committed clear error in declining to exercise supplemental jurisdiction over pendent state law claims without providing written reasons, as requested, so as to allow the Court of Appeals to determine whether the district court relied on permissible factors in declining to exercise such jurisdiction. Unless the district court properly invokes statutory categories for declining to assert supplemental jurisdiction in exercising its discretion to decline to entertain pendent claims, supplemental jurisdiction must be asserted over pendent claims. 28 USCA §1367(c). See Carnegie-Mellon University v. Cahill, 108 S. Ct. 614 (1988); and see Letino v. Fringe Employee Plans, Inc., 611 F.2d 474, 478 (3rd Cir. 1979). The district court refused to exercise supplemental jurisdiction over the appellants' remaining claims and its failure to articulate its reasons for doing so as required by Sparks constituted an abuse of discretion. The Court of Appeals remanded for clarification of the record because it could not know, given the state of the record, whether or not the district court intended to decline to exercise its supplemental jurisdiction; it certainly could not determine without a written explanation from the district court what considerations enumerated in Section 1367(c) were relied on by the district court. The lower court's dismissal was never clearly based on a statutorily enumerated basis for declination of jurisdiction. This was error. Such an order should not have been summarily affirmed by the Court of Appeals given the fact that it specifically remanded for clarification of the record, and no such clarification of the basis for declination of jurisdiction was ever created by the district court. Dismissal of a federal claim does not deprive

a court of the constitutional power to hear pendent claims. Supplemental jurisdiction must be exercised in the absence of any of the four factors of Section 1367(c): "After establishing that supplemental jurisdiction encompasses 'other claims' in the same case or controversy as a claim within the district court's original jurisdiction, §1367(a), the statute confirms the discretionary nature of supplemental jurisdiction by enumerating the circumstances in which district courts can refuse its exercise . . ." City of Chicago v. International College of Surgeons, 118 S. Ct. 523, 533, 534 (1997) (emphasis supplied). The statute makes clear that if power is conferred under Section 1367(a), and its exercise is not prohibited by Section 1367(b), a court can decline to assert supplemental jurisdiction over a pendent claim only if one of the four categories specifically enumerated in Section 1367(c) applies. It is improper for the appellate court to summarily, in response to a Rule 27 Motion, preclude the appellants from raising this issue in their appeal of the district court's orders on remand.

The Third Circuit Court of Appeals is in conflict with its own decisions, with statutory authority, and with U.S. Supreme Court precedent on this subject.

It is important that the general public feel that statute and precedent have meaning when a legal question is presented to a circuit court. For these reasons, the Court of Appeals' decisions should be reviewed.

C. It is beyond dispute that the United States was not a party to the appeal of orders challenged by Petitioners at No. 00-1460 after vacatur and remand, and the Court of Appeals lacked jurisdiction to entertain or affirm a motion for summary disposition of these orders by a non-party to the appeal.

The orders sought to be reviewed by Petitioners at No. 00-1460 did not involve the United States.

The United States had motioned on November 25, 1998, to partially dismiss the previous appeal at No. 98-3494 for lack of appellate jurisdiction, on grounds that the only order (the order of August 25, 1998, defining the scope of a contempt hearing) involving the United States in that appeal was interlocutory in nature.

The Court of Appeals summarily affirmed this motion for partial dismissal of the appeal and eliminated the United States as a party.

Pursuant to Local Appellate Rule 27.4, only a party to an appeal may move for summary disposition of an appeal. The United States was eliminated as a party to the appeal at No. 98-3494 on its own motion as affirmed by the Third Circuit.

The new set of orders on appeal after vacatur and remand at No. 00-1460 did not involve the United States; only the Commonwealth Defendants were parties to these orders.

Because the United States was not a party to petitioners' appeal at No. 00-1460, the Third Circuit lacked jurisdiction to entertain a motion for summary affirmance of the lower court's orders from the United States; non-parties lack standing to intervene in consideration of the merits of an appeal.

It offends both against common sense and the basics of due process for the Court of Appeals to affirm a motion for summary disposition of an appeal from a non-party to that appeal, when the Court lacked jurisdiction to entertain such a motion. The United States acknowledged in its Reply Memorandum of August 23, 2000, that the order from which Petitioners appealed involved only the Commonwealth Defendants. Nevertheless, the United States went on to

conduct itself like a badge-heavy traffic cop who is overly exuberant in his job, shoots first, and plants excuses later. The Third Circuit would be the first court in the land to countenance entertainment and affirmance of a Rule 27 Motion for summary disposition submitted by a non-party to an appeal. This is a maneuver that is encouraged neither by precedent nor by statutory authority; it certainly is not sanctioned by other functioning circuit courts of appeal.

The Third Circuit's disagreement with every other appellate court in the country about this specific legal question should be reviewed in the public interest, and as a matter of judicial discretion. It presents an issue of importance beyond the particular facts and parties involved, and implicates the right to full review of contested legal issues on their merits, as opposed to implosion or falling in on itself of every thought of fairness.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Dated: February 14, 2000.

Respectfully submitted,

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APPENDIX

APPENDIX A	OPINION AND JUDGEMENT FROM THE U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT DATED JULY 15, 1999
APPENDIX B	U.S. DISTRICT COURT ORDER OF APRIL 18, 2000
APPENDIX C-1	U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT'S ORDER OF SEPTEMBER 13, 2000 GRANTING SUMMARY AFFIRMANCE OF THE COMMONWEALTH OF PENNSYLVANIA'S RULE 27 MOTION FOR SUMMARY AFFIRMANCE OF THE DISTRICT COURT ORDERS OF APRIL 18, 2000
APPENDIX C-2	U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT'S ORDER OF SEPTEMBER 13, 2000 GRANTING SUMMARY AFFIRMANCE OF THE UNITED STATES RULE 27 MOTION FOR SUMMARY AFFIRMANCE OF THE DISTRICT COURT ORDERS OF APRIL 18, 2000
APPENDIX D	U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT'S ORDER OF NOVEMBER 17, 2000 DENYING THE PETITION FOR REHEARING

UNREPORTED - NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-3494

ROBERT W. GRINE, II; JOANNE D. GRINE;
and Estate of MARGARET M. GRINE,
Appellants

v.

WILLIAM R. COOMBS; BILLIE M. YOST; JACK W. SHRUM, et ux.; ROTOCAST PLASTIC; ESSEX ENV. IND. INC.; TIONESTA BOROUGH COUNCIL; RONALD HALL, President of Borough Council, in an individual and official capacity; SCOTT DAUM, Borough Manager of Tionesta, in and individual and official capacity; COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION ("DEP"); GARY WOZNIAK, in an individual and official capacity as an agent of the DEP; DANIEL HOLLER, Emergency Response Coordinator, Northwest Region, in an individual and official capacity, as agent of the DEP; RONALD W. COOMBS, Executor of the Estate of WILLIAM R. COOMBS, Deceased; USA ENV PROTECTION; MICHAEL McCABE, Regional Administrator, Region III, U.S. EPA.,

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APPEAL FROM THE UNITED STAES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA
(D.C. Civ. No. 95-cv-00342)
District Judge: Honorable Sean J. McLaughlin

Argued May 4, 1999
Before: ALDISERT, WEIS and STAPLETON, Circuit Judges
Filed: July 15, 1999

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OPINION OF THE COURT

WEIS, Circuit Judge.

Plaintiffs, Robert W. Grine, II, his wife Joann, and his mother Margaret (now deceased), owned and lived on property in Tionesta Borough, Pennsylvania. Their land adjoined a tract owned at one time by defendant William R. Coombs (now deceased). In the spring of 1993, hazardous waste allegedly migrated to the plaintiffs' property from barrels located on Coombs' tract, causing damage to their land and living environment.

In December 1995, plaintiffs filed suit in the Untied States District Court for the Western District of Pennsylvania. In April 1996, they amended their complaint to assert causes of action under the Resource, Conservation, and Recovery Act ("RCRA"), 42 U.S.C. § 6901, et seq., the Water Pollution Control Act ("Clean Water Act"), 33 U.S.C. § 1251, et seq., and the Comprehensive Environmental

Response Compensation and Liabilities Act ("CERCLA"), 42 U.S.C. § 9601, et seq. In addition, the amended complaint listed counts under the Freedom of Information Act, state common law, and the Pennsylvania Hazardous Sites Cleanup Act, 35 P.S. § 6020.101, et seq.

Plaintiffs sued parties who owned the Coombs' land and the offending barrels. Also named were those who later moved the waste to an unknown site or those who increased the waste run-off after plaintiffs sought aid from state and federal environmental officials. Defendants included the Pennsylvania Department of Environmental Protection, and two of its officials, Gary Wozniak and Daniel Holler ("Commonwealth defendants"), as well as the Regional Administrator of the United States Environmental Protection Agency.

On December 31, 1996, citing Fed. R. Civ. P. 12(b)(1) and 12(b)(6), the District Court dismissed the claims against the Commonwealth defendants as immune from suit under the Eleventh Amendment. Although according to the caption, plaintiffs purported to sue Wozniak and Holler in their individual capacities, the Court observed that the substance of the amended complaint equated them with the state agency and did not refer to any action taken in an individual capacity. Accordingly, the claims were actually against the Commonwealth, triggering its constitutional immunity.

The District Court noted that Ex parte Young, 209 U.S. 123 (1908), would otherwise permit claims for prospective injunctive relief against state officials. Here, however, the amended complaint described only past activity, failed to allege continuing federal violations and requested damages, a form of relief unavailable under Ex parte Young. Moreover, plaintiffs were apparently complaining that Wozniak and Holler has not adequately

enforced the environmental laws, a discretionary decision beyond the reach of Ex parte Young.

Finally, citing Pennhurst State School and Hospital v. Halderman, 465 U.S. 89 (1984), the District Court held that the Eleventh Amendment additionally deprived it of jurisdiction over the state law claims asserted against the Commonwealth defendants. Accordingly, the District Court dismissed all claims against them with prejudice. Plaintiffs' appeal to this Court was dismissed for lack of appellate jurisdiction because no final order had been entered under Rule 54(b).

Plaintiffs then filed a Motion for Reconsideration in the District Court, and on August 17, 1998, the prior order was modified to provide that the plaintiffs' state law claims against the Commonwealth defendants would be dismissed "without prejudice." Again, however, the District Court rejected the plaintiffs' contentions that they were entitled to relief under Ex parte Young. The Court reasoned that plaintiffs suffered no harm from the officials' actions in assisting in the removal of hazardous substances from the Coombs' property. Consequently, they lacked standing to assert a violation of the RCRA. The Court left intact its prior decision to dismiss the federal claims against the Commonwealth defendants with prejudice.

In this appeal, in an effort to invoke Ex parte Young, plaintiffs contend that certain actions of Wozniak and Holler - particularly engaging in the illegal handling, storage and transport of hazardous substances - do not amount to conduct within the scope of their official duties. In addition, plaintiffs complain that because the officials failed to abate the contamination, it presents a continuous threat to their property. This, they contend, amounts to the continuing violation of federal law necessary to invoke Ex parte Young.

I.

The Eleventh Amendment provides that "[t]he judicial power of the Untied States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. Amend. XI. A meritorious claim of Eleventh Amendment sovereign immunity, while not purely jurisdiction, is often dismissed under Fed. R. Civ. P. 12(b)(1). See 5A Wright & Miller, Federal Practice and Procedure § 1350 (1990 & 1999 Supp.).

The rulings in this case were predicated on two different procedural rules, 12(b)(1) and 12(B)(6). There is some distinction between them that the parties have not observed - for example, that Rule 12(B)(1) addresses jurisdictional objections and Rule 12(b)(6), failure to state a claim. We will first address the dismissal on quasi-jurisdictional grounds under Rule 12(b)(1) based on Eleventh Amendment immunity. See Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 267 (1997).

The Pennsylvania Department of Environmental Protection is an agency of Pennsylvania and as such, shares the sovereignty of the state. Accordingly, it may not be sued on claims arising under federal environmental laws in federal court by a citizen of Pennsylvania. See Allegheny County Sanitary Authority v. United States Environmental Protection Agency, 732 F.2d 1167, 1174 (3d Cir. 1984). We see no need to repeat the District Court's correct analysis applying Eleventh Amendment immunity to the state agency as well as to Wozniak and Holler in their official capacity.

We do not agree, however, that the dismissals should have been with prejudice. As we have said, "[a] dismissal for lack

of jurisdiction is plainly not a determination of the merits of a claim. Ordinarily, such a dismissal is 'without prejudice.'" Korvettes, Inc. v. Brous, 617 F.2d 1021, 1024 (3d Cir. 1980). See also In re: Orthopedic "Bone Screw" Products Liability Litigation, 132 F.3d 152, 155 (3d Cir. 1997) (if a court lacks subject matter jurisdiction, disposition of the case is to be without prejudice.). A dismissal premised on Eleventh Amendment immunity implicates jurisdictional factors sufficient to convince us that these dismissals should have been without prejudice. See Warnock v. Pecos County, 88 F.3d 341, 343 (5th Cir. 1996).

Of course, a dismissal with prejudice is of no collateral consequence if no other court is able to entertain the claims. We note, however, that one Court of Appeals has concluded that federal court jurisdiction is not exclusive under the RCRA. See Davis v. Sun Oil Co., 148 F.3d 606, 612 (6th Cir. 1998). But see Alden v. Main, ___ U.S. ___, No. 98-436, 1999 WL 412617 (June 23, 1999). Although we have not been called upon to decide that issue, and need not do so here, at a minimum - because of the jurisdictional uncertainty within this Circuit and the state - the order of the District Court should be modified to state that the dismissal under Rule 12(b)(1) based on the Eleventh Amendment immunity of the Commonwealth defendants is "without prejudice."

We do agree, however, that the District Court properly found the Ex parte Young exception inapplicable. The plaintiffs' amended complaint recites past activity and hence, fails to set out claims amendable to prospective injunctive relief. Moreover, the decision and means utilized to enforce the environmental laws are discretionary actions, not the type of ministerial activity contemplated by Ex parte Young. See 209 U.S. at 158-59.

II.

In their brief to this Court, plaintiffs cite Scheuer v. Rhodes, 416 U.S. 232 (1974), for the proposition that a District Court should not dismiss damages actions against state officials sued in their individual capacities based only on information provided in the complaint. We do not agree with the plaintiffs' broad generalization, however. To our mind, Rule 12(b)(6) is applicable to claims of this nature as it is to any other.

Here, the District Court examined the prolix amended complaint, which consisted of some 163 paragraphs setting forth evidentiary material in great detail. As noted, the District Court concluded that plaintiffs had not alleged derelictions by Wozniak and Holler in their individual capacities. Plaintiffs now direct our attention to certain paragraphs which, they assert, do single out actions taken by Wozniak and Holler outside or beyond their official capacity in dealing with the waste on the Coombs' property.

We have closely examined those specific allegations, but conclude that the District Court was justified in reading the amended complaint as it did. However, in the interest of finality, we will assume that plaintiffs have asserted damage claims under the federal environmental statutes against Wozniak and Holler in their individual capacities and proceed to examine these claims.

We held in Allegheny County Sanitary Authority that the Clean Water Act provides a comprehensive plan of enforcement that limits remedies to those provided by the Act. See 732 F.2d at 1175 (examining 33 U.S.C. § 1365(a)). The RCRA and CERCLA are drafted with similar language. See 42 U.S.C. § 6972(a); 42 U.S.C. § 9659(a). Those statutes do not provide plaintiffs with a private cause of action

against Wozniak and Holler in their individual capacities. Hence, even if the amended complaint could be read as plaintiffs urge, those claims were properly dismissed under Rule 12(b)(6) with prejudice.

Although in some instances a dismissal under Rule 12(b)(6) is without prejudice and thus subject to amendment, a plaintiff may choose to stand on the allegations of the complaint. Plaintiffs have chosen that path -- they appealed to this Court in 1997 relying on the language of their amended complaint, failed to request leave to amend after entry of the December 31, 1996 order, and maintained during oral argument before this Court that they continued to stand by those allegations.

We note, however, that some of the allegations directed against Wozniak and Holler seemingly do assert violations of state statutory and common law. As such, they are pendent claims which a District Court may dismiss when it disposes of the federal claims before it. See United Mine Workers v. Gibb., 383 U.S. 715, 726-27 (1966); see also 28 U.S.C. § 1367(c). The record in this case is not absolutely clear, but we gather that the District Court, in its amended order dismissing the state claims without prejudice, intended to exercise its discretion to decline jurisdiction over those pendent claims.

To clarify the record, we will remand this case to the District Court so that it may prepare appropriate orders:

(1) dismissing the plaintiffs' claims against the state agency and Wozniak and Holler in their official capacity without prejudice under Rule 12(b)(1);

(2) dismissing the plaintiffs' claim for damages against Wozniak and Holler in their individual capacity under the Clean Water Act, RCRA, and CERCLA with prejudice under Rule 12(b)(6); and

(3) declining to adjudicate the plaintiffs' common law and state claims under its pendent jurisdiction (if that is the District Court's intention).

III.

Plaintiffs also complain that the District Court erred in excluding the Commonwealth defendants from a contempt hearing. The District Court did so for two reasons: 1) because the Commonwealth defendants had been dismissed already from the case, and 2) because plaintiffs had failed to establish that the Commonwealth defendants violated any specific court order.

To establish civil contempt, plaintiffs must prove by clear and convincing evidence that (1) a valid order existed; (2) defendants knew of the order; and (3) defendants disobeyed the order. See Roe v. Operation Rescue, 54 F.3d 133, 137 (3d Cir. 1995). Plaintiffs, however, although they allege oral direction of the District Court, fail to point to an order of the type necessary to support civil contempt. See Harris v. City of Philadelphia, 47 F.3d 1342, 1349 (3d Cir. 1995). Accordingly, we find no error and affirm the order of the District Court excluding the Commonwealth defendants

from the contempt hearing. The case will be remanded to the District Court for further proceedings in conformance with this opinion.

TO THE CLERK:

Please file the foregoing Opinion.

/s/ Ruggero J. Aldisert
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ROBERT W. GRINE, II, et al.,	)	
Plaintiffs,	)	
	)	Civil Action No. 95-342 Erie
v.	)	
	)	
WILLIAM R. COOMBS, et al.,	)	
Defendant.	)	

ORDER

AND NOW, this 18th day of April, 2000, in accordance with the July 15, 1999 Memorandum Opinion and Judgement issued by the Third Circuit Court of Appeals in the above-captioned matter,

IT IS HEREBY ORDERED that this Court's previous orders of December 31, 1996 and August 17, 1998 are modified and/or clarified to provide as follows:

1) Plaintiffs' claims under the Resource, Conservation, and Recovery Act ("RCRA"), 42 U.S.C. § 6901 et seq., the Water Pollution Control Act ("Clean Water Act"), 33 U.S.C. § 1251 et seq., and the Comprehensive Environmental Response Compensation and Liabilities Act ("CERCLA"), 42 U.S.C. § 9601, et seq., against Commonwealth Department of Environmental Protection and Defendants Wozniak and Holler in their official capacities are DISMISSED WITHOUT PREJUDICE pursuant to Fed. R. Civ. P. 12(b)(1);

2) To the extent Plaintiffs' have asserted claims under RCRA, the Clean Water Act, and CERCLA for damages against Defendants Wozniak and Holler in the individual capacities, said claims are DISMISSED WITHOUT PREJUDICE pursuant to Fed. R. Civ. P. 12(b)(6); and

3) The Court declines to exercise supplemental jurisdiction over Plaintiffs' common law and state claims against Defendants Wozniak and Holler in their individual capacities and, accordingly, those claims are DISMISSED WITHOUT PREJUDICE pursuant to Fed. R. Civ. P. 12(b)(1).

/s/_____
Sean J. McLaughlin
United States District Judge

cm: All counsel of record: /s/TH

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

August 2, 2000
E-1
***AMENDED August 24, 2000**

No. 00-1460

GRINE

V.

COOMBS

ROBERT W. GRINE, JOANNE D. GRINE and
ESTATE OF MARGARGET M. GRINE,
Appellants

(D.C. civil no. 95-342 Western District of PA (Erie) (SJM)

Present: SLOVITER, MANSMANN and GREENBERG, Circuit Judges

1. Motion by Appellees for Summary Affirmance

2. Response by Appellants to Appellees' Motion For Summary Affirmance

*3. Reply by Appellees to Appellants' Response to Motion for Summary Affirmance

See B-96

/s/_____
Tika L. Parks
Case Manager (267) 299-4929

ORDER

The foregoing motion for summary affirmance is granted and the order appded(sp.) is affirmed.

By the court,

/s/ _____
Circuit Judge

Dated: SEP 13 2000

/s/tep/cc: JSH
JMP
TAW

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

August 22, 2000
E-13
*AMENDED 9/1/00

No. 00-1460

GRINE

V.

COOMBS

ROBERT W. GRINE, JOANNE D. GRINE and
ESTATE OF MARGARGET M. GRINE,
Appellants

(D.C. civil no. 95-342 Western District of PA (Erie) (SJM)

√

Present: SLOVITER, MANSMANN and GREENBERG, Circuit Judges

1. Motion by Appellees Commonwealth of Pennsylvania Department Of Environmental Protection, Daniel Holler, and Gary Wozniak For Summary Affirmance and Withdrawal of Appellees' Motion to Dismiss

*2. Response by Appellants to Appellees' Motion For Summary Affirmance

/s/_____
Tika L. Parks
Case Manager (267) 299-4929

C-2-1

ORDER

The foregoing motion to dismiss is deemed withdrawn. The motion for summary affirmance is granted and the order appded(sp.) is affirmed.

By the court,

/s/_____
Circuit Judge

Dated: SEP 13 2000

/s/tep/cc: JSH
JMP
TAW

UNITED STATES COURT OF APEALS
FOR THE THIRD CIRCUIT

No. 00-1460

ROBERT W. GRINE, II, JOANNE D. GRINE,
and ESTATE OF MARGARET M. GRINE,
Appellants

v.

WILLIAM R. COOMBS et al.

SUR PETITION FOR REHEARING

Present: BECKER, Chief Judge, SLOVITER, MANSMANN, SCIRICA, NYGARRD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, and GREENBERG* Circuit Judges

The petition for rehearing filed by Appellants in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

/s/_____
Circuit Judge

Dated: NOV 17 2000
/s/tep/cc JSH, JMP, TAW